

DEC. 2 1944

IN THE

CHARLES ELMORE DROPLEY
CLERK

Supreme Court of the United States

October Term, 1944.

Nos. 368, 369, 370.

GEMSCO, INC., *et al.*,

Petitioners,

v.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor.

MILDRED MARETZKO, *et al.*,

Petitioners,

v.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor.

JOSEPHINE GUISEPPI, *et al.*,

Petitioners,

v.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor.

BRIEF FOR INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK, AMICUS CURIAE.

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**BRIEF FOR INDUSTRIAL COMMISSIONER OF THE
STATE OF NEW YORK, AMICUS CURIAE.**

The grant of certiorari in this case was limited to the question of the statutory authority of the administrator of the Wage and Hour Division under Sec. 8(f) of the Fair Labor Standards Act (29 U.S.C.A. § 208), to include terms and conditions prohibiting industrial home work in a minimum wage order issued under Section 8 of the Act,

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in order to carry out the purposes of such order, "to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein".

Although the question relates primarily to the construction of a Federal statute, the decision in this case is of real importance to the State of New York in the administration of its own laws relating to industrial home work and minimum wage standards (New York Labor Law, Articles 13, 19). If the Federal Administrator is without power to enforce restrictions on home work, it will be more difficult to avoid evasion of New York home work orders or loss of the businesses affected to states without such regulation.

The Necessity of Prohibiting Home Work.

The Industrial Commissioner believes that, in industries where home workers have been employed, stringent restrictions on home work are one of the essential factors in raising the standards of wages and working conditions for full time factory workers.

The experience and policy of New York State is embodied in the statement of purpose of the New York statute (New York Labor Law, Sec. 350, subd. 1), as enacted by L. 1935, c. 182:

"Sec. 350. Legislative purpose and definitions. 1. The employment of women and minors in industry in the state of New York under conditions resulting in wages unreasonably low and conditions injurious to their health and general welfare is a matter of grave and vital public concern. Any conditions of employment especially fostering such working conditions are therefore destructive of purposes already accepted as sound public policy by the legislature of the state and should be brought into conformity with that policy. Uncontrolled continuance of home-work is such a condition; here wages are notoriously lower and working

conditions endanger the health of the worker; the protection of factory industries, which must operate in competition therewith and of the women and minors employed therein and of the public interest of the community at large in their health and well-being, require strict control and gradual elimination of industrial homework. In the considered judgment of the legislature this article is constitutional."

The reasons for restricting homework in New York have been the low wages and poor working conditions of home-workers and the impossibility of adequate regulation of industrial homework except through a policy of drastic restriction with a view to gradual elimination.

The first statute regulating industrial homework was enacted in 1892 (L. 1892, c. 673, amended by L. 1893, c. 173, L. 1896, c. 991, and L. 1897, c. 415; New York Labor Law of 1897, Sec. 100). The original plan of the statute was simply to require the licensing of employers giving out industrial homework and provide for the inspection of the sanitary and other conditions in the homes where the work was done. This policy was continued through successive amendments (L. 1899; c. 191; L. 1904, c. 550; L. 1906, c. 129; Labor Law of 1909, Sec. 100; L. 1913, c. 260; L. 1921, c. 50; L. 1932, c. 240).

Experience through the years proved the difficulty of preventing abuses in home work through the system of regulation which preceded the 1935 statute. Low wages, whether computed on a weekly or hourly basis, child labor, improper working conditions and unfair competition with factory workers were among the abuses which existed. (See Special Bulletin 158, New York Department of Labor (Frances Perkins, Industrial Commissioner), issued Feb. 1929, entitled "Some Social and Economic Aspects of Homework").

A more recent discussion of the problem is found in Special Bulletin 199 of the New York State Department of

Labor, issued in 1938, entitled "Homework in the Artificial Flower and Feather Industry in New York State." This cites the statements of the Artificial Flower and Feather Branch of Local 142, affiliated with the International Ladies Garment Workers Union, concerning the effect of homeworkers in the garment trade:

*** 'The unemployed shop workers watch hundreds of homeworkers call for and deliver work,' they stated; due to the competition of whole families, including children, who work at home at lower wages for longer hours, women in the flower industry do not earn a living wage; no wage standards (such as those of the union) can be maintained as long as homework and homework contracting continue; the homeworkers themselves are exploited in that they work long and unregulated hours for inadequate wages; strikes to better conditions are broken by the use of homeworkers.' (p. 18.)

See also the following quotations from that booklet:

"The effect of the competition of homeworkers working for short periods, diverting work from the factory workers and increasing the irregularity of factory employment, is reflected in the low annual earnings of the women workers in the shops." * * * (p. 40.)

"That the distribution of flower making to homeworkers and their overlong hours of work for a few weeks in the season aggravate the irregularity of employment of the women in the shops is evident." * * * (p. 57.)

The conclusions and findings at page 72 of the bulletin confirm what has been said above.

Miss Kate Papert, Director of the Division of Women in Industry and Minimum Wage of the New York Department of Labor, testified at the Federal Labor Department's hearing on the proposed issuance of the regulation which is attacked in these proceedings. (S. M. 1476 ff., session of

Nov. 12, 1942). It appears from the material referred to in her testimony that the embroidery industry is concentrated around New York City (See also Wage and Hour Division, Research and Statistics Branch, Report on the Embroideries Industry [1940], p. 30), and that hourly earnings for the average homeworker in the industry in 1937 ranged from nine cents to seventeen cents.

Although conditions improved somewhat after the Federal Fair Labor Standards Act went into effect in 1938, it was found, in 1939, that almost three-quarters of the homeworkers were still paid less than thirty-two and one-half cents per hour, the Federal minimum for the textile industry at that time (U. S. Department of Labor, Childrens Bureau, Industrial Homework Conditions in the Candlewick Bedspread and Lace Industries (1941), p. 43).

The effects of homework are set forth also in a report of the Division of Women, Child Labor and Minimum Wage, of the New York Department of Labor, issued in August 1944, entitled "Trends in Homework Industries in New York State, 1942-1944":

"Homework has always been synonymous with cheap labor. The Homework Law states, and previous studies have repeatedly shown, that earnings of homeworkers are 'notoriously lower' than wages of factory workers. The higher wage levels now prevailing for factory workers and the minimum hourly rates prescribed by the Wage and Hour Law have had some effect in raising the wages of homeworkers. However, the earnings reported by homeworkers show that there still are a considerable number being paid sub-standard wages." (p. 9).

"The employment of young children has always been one of the worst evils of the homework system. Because many homework operations require little skill or dexterity, the help of children can readily be enlisted. Under the Labor Law, no child under 16 may

do homework and no child between 16 and 18 is permitted to work at home without both employment and homework certificates. However, homework investigations have emphasized the impossibility of adequate inspection to enforce child labor, as well as other laws, in homes. Before the inspector can gain admittance to a home, there is plenty of time to conceal illegal employment of children. * * * (p. 15).

See also Frieda S. Miller, Industrial Homework in the United States (1941), 43 International Labour Review 1, at pages 22, 27, 32, for a historical review of the nationwide problem.

The effect of industrial homework in reducing the earnings of factory workers is shown also in the findings of the New York Department of Labor concerning homework in the glove industry in New York State. A copy of these findings, taken from the report prepared by the Division of Women in Industry and Minimum Wage, published in May, 1941, is annexed as an appendix.

Industries Have Adjusted Themselves to the Prohibition of Home Work Without Serious Difficulty.

The Industrial Commissioner, acting under Article 13 of the New York Labor Law, has issued four orders prohibiting or restricting industrial homework:

Order No. 1, prohibiting industrial homework in the men's and boys' outer clothing industry, issued April 25, 1936;

Order No. 2, prohibiting industrial homework in the men's and boys' neckwear industry, issued February 26, 1937;

Order No. 3, prohibiting industrial homework in the artificial flower and feather industry, issued October 20, 1939;

Order No. 4, restricting industrial homework in the glove industry, issued May 15, 1942.

Not only Miss Papert's testimony before the Federal Administrator in connection with the issuance of the order under attack in this case, but also a published report of the New York Labor Department show that these orders have worked out satisfactorily without causing undue hardship to either the employers or the homeworkers. As was stated in the report quoted above on "Trends in Homework Industries in New York State, 1942-1944":

"At one time the men's clothing industry ranked as the largest homework industry in the State, and in men's neckwear, homework was strongly entrenched in the hand operations of four-in-hand and bow ties. The NRA codes for both of these industries restricted homework, but with the nullification of the NRA in 1935, homework threatened to return. The promulgation of the Homework Orders effectively stopped this trend. Today, with only a small number of homeworkers, the industries are better off from the point of view of efficiency of production, the stability of the industries and the well-being of their workers.

"Prior to the Artificial Flower and Feather Order, the making of flowers had been long associated with sweatshop conditions, child labor, low wages and long hours of work in tenements. Today, the industry presents an entirely different picture. From 5,000 homeworkers before the Homework Order became effective, on June 1, 1944 there remained but 145 certificated homeworkers. The number of firms employing homeworkers decreased from 79 to 32.

"Moreover, this shift from homework to factory production has benefited the artificial flower industry and its workers. A study of the adjustment of the industry to the restriction of homework revealed an increase of 30 per cent in factory employment during the first year that the Order was in effect, an increase directly attributable to the Order. For most employers no difficulties were encountered in replacing homeworkers by factory workers. By reducing unfair competition, the Order helped to stabilize the industry.

The study also showed that former homeworkers had satisfactorily adjusted to the Order." (p. 18).

See also:

New York State Department of Labor, Division of Women in Industry and Minimum Wage, "An Industry Adjusts—a study of the adjustment of the artificial flower industry to Homework Order No. 3," issued in June 1941;

Report of Industrial Commissioner for 1939, N. Y. Leg. Doc. (1940) No. 21, p. 33;

Report of Industrial Commissioner for 1941, N. Y. Leg. Doc. (1942) No. 90, p. 54.

Conclusion.

From all the foregoing we believe it clearly appears that prohibition or drastic restriction of industrial homework is one of the essential conditions to carrying out the purposes of a minimum wage order and preventing circumvention or evasion of the rates established therein.

Dated: November 27, 1944.

Respectfully submitted,

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APPENDIX.

STATE OF NEW YORK

DEPARTMENT OF LABOR

Homework in the Glove Industry in New York State.

Prepared by Division of Women in Industry and
Minimum Wage May 1941

(pp. 191-194) The findings of this investigation in the glove industry show that:

1. Homeworkers, who, in some cases, are assisted by other members of the family, work at home in competition with makers and other production workers in the factories. The number of homeworkers has been increasing in recent years. In some years, the number of homeworkers on leather gloves has exceeded the number of women factory workers. The number of homeworkers employed at finger closing on knit gloves exceeds the number of factory workers in this occupation.

2. Even during peak weeks in busy seasons, when homeworkers were provided with the most work, their earnings were below a subsistence level, and many families had to receive aid from public funds.

3. In the interest of the public welfare, and in order to protect the health of women and minors, New York State has long regulated the hours of such workers in factories, but the homework system offers an escape from hours regulation. Some homeworkers had to work extremely long hours, at night and seven days of the week during peak periods and at other times, while many factory workers had less than a full week's work.

4. The homework system intensifies ~~the~~ seasonal irregularity of employment among women factory workers. During the busy season, the employer is enabled to send out rush orders to homeworkers, thus greatly increasing his labor force at short notice, without adding to his overhead. As a result he is encouraged to operate on a short-time basis instead of attempting to stabilize employment of his factory force by planning production over longer periods.

5. Not only is the employment of factory workers adversely affected by the formidable competition of home-

workers, but the earnings and labor standards of both suffer as a consequence of the homework system. At the peak of the season, weekly wages of homeworkers were from one-half to three-quarters of the earnings of women factory workers in the different branches of the industry; many factory workers had less than a full week's work while some homeworkers worked extremely long hours. During peak weeks in a year of increased production, more factory workers had less than a full week's work than in the peak week of the year before. Thus, in a year of increased production, more of the increased employment went to homeworkers than to factory workers. Nevertheless, the annual earnings of homeworkers were about half the annual earnings of factory workers. It seems reasonable to conclude that it is largely because of the competition of homeworkers that the majority of the women factory workers were unable to earn wages sufficient for self-support, even during the busiest week of the season, and that the weekly earnings of women in this industry compared unfavorably with those in other factory industries, and that their annual wages compared unfavorably with those in some of the lowest wage industries found in the State.

6. New York is the leading state in the manufacture of gloves, accounting for well over half of the value of all types of dress gloves produced in the United States. New York is the only state in which homework on gloves is prevalent, the glove industry in other states operating almost exclusively without the use of homework. In recent years, the relative position of factory workers in this industry in New York State has become worse as compared with workers in other states where homework is negligible.

7. The wage and hours standards of the Federal Wage and Hour Law, which are applicable both to factory workers and to homeworkers in the glove industry, have had little appreciable effect on the competition which homeworkers offer to factory workers with respect to employment and labor standards. Even during the busiest week of the season, many skilled factory workers and homeworkers earned less than the legal minimum hourly rates established under the Federal Wage and Hour Law, and less than the rates fixed under the State Minimum Wage Law for workers in relatively unskilled occupations.

8. The economic advantages in lower overhead and lower labor costs, which are enjoyed by employers using homework, are gained at the expense of both homeworkers and factory workers. The employment of low-paid homeworkers to reduce capital investment in plant or machines, or to cut down overhead expenses, represents an unfair competitive advantage to the more progressive employers, in that it tends to undermine the stability of production and the wage and price standards of the industry.

It is therefore recommended that under the powers granted to her in Article 13, Section 351 of the Labor Law, the Industrial Commissioner prohibit homework in the glove industry, following the precedent established by orders now in effect prohibiting homework in the men's and boys' outer clothing industry, the men's neckwear industry, and the artificial flower and feather industry. When these three industries were operating under the homework system, the conditions found were similar to those prevailing in the glove industry today. They have successfully adjusted to the strict control and gradual elimination of homework.